No. 17-1042

In the Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

MICHAEL D. LOOS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief of *Amici Curiae* SMART (The International Association of Sheet Metal, Air, Rail, and Transportation Workers) and ARLA (The Academy of Rail Labor Attorneys) Supporting Respondent

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STATEMENT OF INTERESTS OF *AMICI CURIAE* SMART (THE INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL, AND TRANSPORTATION WORKERS) AND ARLA (THE ACADEMY OF RAIL LABOR ATTORNEYS)[1]

SMART, the International Association of Sheet Metal, Air, Rail and Transportation Workers, is the certified labor representative for more than 216,000 employees. Among those whom it represents are conductors, engineers, train service employees and other rail employees employed by the nation's rail carriers. SMART is actively engaged in legislative efforts and litigation affecting the rights of its members and public safety, and it has a substantial interest in this case because its members are subject to taxes under the Railroad Retirement Tax Act.

ARLA, the Academy of Rail Labor Attorneys, is a professional association of plaintiffs' attorneys whose practice includes the representation of injured railroad workers and their families under the Federal Employers' Liability Act. ARLA is actively engaged in legislative efforts and litigation affecting the rights of the clients its members represent, and it has a substantial interest in this case because those clients obtain FELA verdicts against Petitioner and the other railroads.

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[1] Both parties have consented to ARLA and SMART filing an *amicus* brief. Pursuant to Rule 37.6, ARLA and SMART state that no person or entity other than ARLA and SMART have made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

SUMMARY OF ARGUMENT

After eighty years of the Federal Employers Liability Act ("FELA") and Railroad Retirement Tax Act ("RRTA") coexisting, Petitioner and its *amici* raise a novel argument: that wage loss awards in cases brought under the FELA are taxable. Adoption of this novel position would result in an increase to the tax liabilities of Petitioner and the other members of its *amicus*, the American Association of Railroads ("AAR"). This raises the question: Why are the railroads arguing to pay more in taxes?

While the railroads would have the Court believe that they want nothing more than to ensure parity between benefits received under the Railroad Retirement Act ("RRA") and taxes paid under the RRTA, even a cursory review of the railroads' argument demonstrates that not only are they addressing a problem that does not exist but also that their proposed "solution" creates the very inequities it is supposed to cure.

The railroads' true motivation for arguing to end an enduring status quo is that they have realized that taxing FELA verdicts will penalize plaintiffs who proceed to trial, thereby allowing them to coerce injured workers to settle their FELA cases for less money. In other words, the railroads' novel argument is just another part of its agenda of attacking the FELA. The Court should decline to adopt the novel argument and create new inequities just so that the railroads can pay workers less than what they are owed for their injuries.

ARGUMENT

I. The Supposed Unfairness of the Status Quo

The AAR argues that injured workers are receiving benefits without paying for them, which it says is unfair and necessitates the Court finding that FELA wage loss awards are taxable. This argument is not only irrelevant but also untrue. Indeed, adoption of the railroads' position would result in the inequities against which they argue.

Through the RRA, Congress established a federal pension system for retired and disabled railroad workers. *See, e.g.*, Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68 Soc. Sec. Bull. No. 2, at 41 (2008). Like social security, the amount in taxes paid may be asymmetric to the amount in benefits received, with some workers receiving more benefits than their former coworkers, others receiving less, and still others receiving no benefits at all. *See, e.g.*, 45 U.S.C. §§ 231a, 231(f)(1) (demonstrating that the benefits have different eligibility requirements, such as different required minimum years of service, and that coworkers can receive different benefits because the benefits are based on "years of service" and levels of compensation, and the benefits may be accelerated due to disability).

Injured workers possibly receiving more benefits is consistent with the RRA's purpose. Moreover, consider that any supposed imparity has not caused the RRA to be underfunded. *See, e.g.*, U.S. Railroad Retirement Bd., *2018 Annual Report* 2, https://rrb.gov/sites/default/files/2018-08/2018_Annual_Report.pdf ("[T]he

railroad retirement system will experience no cash-flow problems during the next 29 years.")

Plus, it has been the experience of the amici submitting this brief that if an injured worker obtains a verdict and wants service credit, the railroads take the position that the credit can only be obtained through settlement, which the railroads use to coerce the employee to accept an amount that is less than what the jury awarded.

Adoption of the railroads' position, on the other hand, would result in a disparity between benefits received under the RRA and taxes paid under the RRTA, with injured workers paying for benefits they will not receive. For example, when a railroad's negligence kills a worker, whatever amount the jury awards his or her family for wage loss will be taxed even though the family may or may not receive any survivor benefits and whatever survivor benefits they do receive are less than what the employee would have received had he or she not been killed. *See, e.g.*, 45 U.S.C. § 231a. As another example, railroad employees' RRA benefits do not vest unless and until they have five years of service credit, which means injured workers who have less than five years of service credit would pay taxes for benefits they will not receive. *Id.* As a final example, workers who are sixty years of age and have thirty years of service credit can retire with "full benefits," which means their verdicts will be taxed even though they will not receive any more benefits than those to which they were already entitled. *Id.*

Contrary to what the AAR argues, injured workers are not receiving benefits without paying for them. Adoption of the railroads' position, however, would

result in the opposite happening. And either way, any disparity between taxes paid and benefits received is irrelevant to whether FELA wage loss awards should be taxed.

II. The Railroads' True Motive

The railroads cannot cite to a single instance in which the IRS has sought to tax a FELA wage loss award. At the same time, the railroads are arguing for a result that would increase their tax liability, *e.g.*, in this case, the Petitioner asks that the Court find not only that Respondent owes $3,765 in taxes but also that it owes an additional $6,234 to the IRS. (Pet.App. 21a-23a, 29a.) This raises a question: What is motivating the railroads to argue that they should be forced to pay more in taxes?

If the Court finds that FELA wage loss awards are taxable, it will be creating a "trial penalty." Specifically, the railroads will be able to tell injured workers that a verdict will result in the jury attributing a substantial portion of the award to wage loss, which will be taxed, and that they are therefore better off taking a settlement, in which the parties can attribute money away from wage loss.

Thus, this case is not about railroads genuinely believing, after nearly eighty years, that FELA wage loss awards have suddenly become taxable; rather, the railroads have discovered that although taxing FELA wage loss awards will increase their tax liability, those amounts will be more than offset by the amounts they will be able to save by coercing injured workers to accept lower (and possibly inadequate) settlement offers.

This case is just the latest step in Petitioner's and the railroads' attack on the FELA. For example, Petitioner and the other railroads have a long history of trying to minimize the amounts they pay to their workers for their injuries by discouraging them from reporting them in the first place, blaming them for whatever injuries they do report, and manufacturing pre-textual reasons to terminate those who they cannot blame. *See, e.g.*, *Report of Majority Staff of the Committee on Transportation and Infrastructure Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearings Before the H. Comm. on Transportation and Infrastructure*, 110th Cong. (Oct. 22, 2007) (Administrator of the Federal Railroad Administration testifying that "[t]he underlying motivators driving harassment and intimidation [of injured workers] are varied and powerful, and deeply engrained in railroad culture"). As another example, when trying to coerce a worker who wants service credit to accept a settlement offer for less money than what a jury has or would award him or her, the railroads take the position that service credits can only be obtained through settlement, which is contrary to the position it has taken in this case. *Supra* at 4. For a third example, courts have found that Petitioner has been defending itself in FELA cases by engaging in "a pattern of practice that relies on misconduct to prevail in court." *Anderson v. BNSF Ry.*, 380 Mont. 319, 348-50 (2015). For a final example, although courts have rejected their attempts, the railroads have argued that the amounts they pay for FELA awards should be offset by RRA benefits. *See, e.g.*, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 588 n.22 (1979) (citing *Hetrick v. Reading Co.*, 39 F. Supp. 22 (D.N.J. 1941); *Eichel v. New York Cent. R.*

Co., 375 U.S. 253, 254 (1963) (per curiam); *United States v. Price*, 288 F.2d 448, 451 (4th Cir. 1961); *New York, N.H. & H.R. Co. v. Leary*, 204 F.2d 461, 468 (1st Cir. 1953).

Petitioner's history of trying to minimize the amounts it pays to injured workers clarifies why it has taken the counterintuitive position it has taken here. After more than eighty years of the FELA and RRTA having coexisted, Petitioner suddenly believes that FELA wage loss awards should be taxed because it sees an opportunity to further reduce the compensation it must pay to injured workers.

CONCLUSION

The railroads have put forth a novel position because they have realized that adoption of it would create a "trial penalty," which they can use to decrease the amounts they pay to workers to compensate them for their injuries. This is underscored not only by the railroads' history of attacking the FELA but also the disingenuousness of its equity-based argument. The Court should decline to assist the railroads in its efforts to minimize the amounts they pay to injured workers.

Respectfully submitted,

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